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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

IN RE: GRAND JURY PROCEEDINGS

BANK OF NOVA SCOTIA,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE COMMONWEALTH OF THE BAHAMAS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The Commonwealth of the Bahamas is an independent, sovereign archipelagic nation of approximately 70,000 square miles, located in the western Atlantic Ocean, points of which are less than fifty miles from the east coast of the United States. A former British colony, the Commonwealth will celebrate in July, 1983 the tenth anniversary of its independence. The Bahamas enjoys a democratic form of government patterned after the British system, with an independent judiciary and a bicameral legislature composed of a Senate and a House of Assembly. In fact, an elected House of Assembly has

existed as part of the government of the Bahamas for more than 250 years. As in other western countries, the Bahamas Parliament has enacted legislation covering a wide variety of subjects in both civil and criminal law. Among this legislation is the Bank and Trust Companies Regulation Act, which prohibits the disclosure of the confidential records ordered by the lower court in this case, except by procedures authorized by the Act.

The Commonwealth is vitally interested in the decision of the court below in this matter. Unless reversed by this Court, the ruling would authorize any American grand jury or investigative authority to require a foreign national to violate the criminal law of the Bahamas or any other country and to reveal confidential records located there, despite the absence of any finding that the records are relevant or necessary and despite the availability of alternative means to obtain the records at issue. Such a result not only would conflict with the decisions of other federal circuit courts of appeals and this Court, but also would violate fundamental principles of sovereignty recognized by international law and would threaten relations between the United States and other nations. As the Department of Justice itself has recognized, the views of foreign governments concerning issues such as those raised in this case are "entitled to appropriate deference and weight." *See* Statement of Interest of United States in *Westinghouse Electric Corp. v. Rio Algom Ltd.* (May 6, 1980), reprinted at 1980 Trade Reg. Rep. (CCH) ¶ 50,416.

The Commonwealth accordingly has a vital interest in prompt review by this Court of the decision below, and supports the petition for a writ of *certiorari*.

CONSENT OF THE PARTIES

This *amicus curiae* brief is being filed with the consent of both parties, whose letters of consent are on file with the Clerk of the Court.

ARGUMENT

I. The Decision Below Violates Fundamental Principles of International Law and Threatens Relations Between the United States and Other Sovereign Nations.

The court below affirmed a civil contempt order against The Bank of Nova Scotia, a Canadian bank with branches in the United States and an office separately registered under the laws of the Bahamas. The order required the Bank to comply with an American grand jury demand that it produce bank records located in the Bahamas concerning a Bahamian bank customer who was under investigation by a U.S. grand jury. The Court of Appeals recognized explicitly that the Commonwealth's law prohibits the disclosure of such private bank records under the Banks and Trust Companies Regulation Act, and that compliance with the American court order would require violation of Bahamian criminal law which could lead to criminal sanctions against the Bank. 691 F.2d at 1386. The court further recognized that the U.S. government had made no demonstration that the records were necessary or even relevant to the investigation. *Id.* at 1387. The court nevertheless held that the subpoena should be enforced and the Bank should be held in contempt, although the government had made no attempt to seek to obtain the records through a Bahamian court order or other means. *Id.* at 1390.

The consequences of this ruling for foreign governments such as the Commonwealth of the Bahamas are serious and far-reaching. The Court of Appeals' decision effectively carves out a unilateral exception to criminal laws enacted by sovereign foreign governments prohibiting the disclosure of confidential records. It arrogates to the American courts the unique power to command that a foreign national disobey the criminal law of another sovereign whenever an American grand jury so requests, regardless of whether the records requested are shown

to be relevant or necessary. It authorizes American investigative authorities to extend the reach of their enforcement power into the territory of other independent nations, without even attempting to follow the procedural rules established by these nations themselves.

Such a result defies fundamental legal principles acknowledged both by this Court and by international law. This Court has long recognized that "the jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute," and that all exceptions to the "full and complete power of a nation within its own territory must be traced up to the consent of the nation itself." *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116, 136 (1812) (Marshall, C.J.). *Accord, e.g., Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); I.L. Oppenheim, *International Law* § 15 (8th ed., Lauterpacht, 1955). This Court has similarly acknowledged that a country cannot effectively extend its enforcement jurisdiction "beyond its own territory" into another sovereign nation, at least where the result is to compel conduct in violation of foreign law. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824). *Accord, e.g., FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1317-18 (D.C. Cir. 1980); *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] 1 All E.R. 434, 447-48, 460, 466; Report of the Fifty-First Conference, International Law Association, 403, 407 (Tokyo 1964) ("Tokyo Conference"). Yet this is precisely what the court below required, in flagrant disregard of Bahamian law and international legal principles.

The decision below conflicts directly with the rulings of other federal circuit courts of appeals which, unlike the court below, have respected these applicable legal principles and refused to order conduct abroad in violation of foreign law. For example, in *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), the Court of Appeals affirmed an order modifying a grand jury

subpoena in order to prevent the subpoenaed disclosure of bank records which would have violated Panamanian law. The court explained that "fundamental principles of international comity" mandated that American courts refrain from requiring parties to violate or circumvent other nations' confidentiality laws. *Id.* at 613. *Accord, e.g., Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (modifying subpoena to prevent production of documents located in Canada which would have violated Canadian law); *In re Grand Jury Investigation of Shipping Industry*, 186 F. Supp. 298, 318, 320 (D.D.C. 1960) (restricting scope of grand jury subpoena to records located in United States, at least until government demonstrated specific need for foreign documents). Other courts have similarly refused to impose sanctions on parties unable to comply with subpoenas or other document requests because of foreign laws prohibiting disclosure, contrary to the decision of the court below. *E.g., United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983); *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977). This conflict between the principles recognized both by American and foreign authorities and the decision below warrants review and reversal by this Court.

Beyond this clash with fundamental precepts of international law, the decision below also has serious implications for relations between the United States and other countries. Many nations have laws which protect the confidentiality or otherwise prohibit disclosure of bank and other records. In addition to the Commonwealth of the Bahamas, these nations include such close American allies as Great Britain, Canada, and West Germany.[1] Previous

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[1] A number of such statutes are compiled in Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 Ford. L. Rev. 877, 879-80 n.1 (1982). *See, e.g.*, Law of May 24, 1965, Bundesgesetzblatt, Teil II [BGB 2] 835 (W.Ger.); Protection of Trading

attempts by American authorities to force disclosure in violation of such statutes have led to vehement international protests from governments around the globe. *See, e.g.*, Tokyo Conference, *supra*, at 403-06, 565-92; *Rio Tinto Zinc*, *supra*, 1 All E.R. at 447-48, 460; *FTC v. Compagnie de Saint-Gobain*, *supra*, 636 F.2d at 1325. In fact, the American Law Institute has recently reported that "no aspect of the extension of the American legal system beyond the territorial frontiers of the United States has given rise to so much friction" as American demands for documents located abroad, and that some 15 countries have adopted legislation "expressly designed to counter [such] U.S. efforts." Restatement of Foreign Relations Law of the United States (Revised) § 420, Reporters' Notes at 18 n.1 (Tent. Draft 3, 1982).[2]

If permitted to stand, therefore, the decision below cannot help but trigger a new round of diplomatic controversy and threaten to disrupt relations between the United States and other countries. For example, American efforts to resolve the problems posed by extraterritorial discovery requests through treaties or other cooperative means, which are currently under way, will be impeded by the understandably negative reaction of other

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Interests Act, 1980, ch. 11 (U.K.); Business Records Protection Act, Ont. Rev. Stat. ch. 54, § 1 (1970); Economic Competition Act, 1956 Staatsblad voor het Koninkrijk der Nederlanden [STB.] 401, art. 39, amended by Act of July 16, 1958, STB. 413 (Neth.) (English translation at 5 OECD, Guide to Legislation on Restrictive Business Practices 1, 18-19) (June 1972). *See also* Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 Yale L.J. 612, 613 nn.4 & 5 (1979).

[2] *See also id.* at 20-22 n.3. Indeed, the current draft of the Restatement specifically provides, contrary to the decision below, that where disclosure of documents located in another country would violate that country's law, an American court should generally limit itself to ordering a party to "make a good faith effort to secure permission from foreign authorities to make the information available," and should not ordinarily impose contempt or other sanctions. *Id.*, § 420(2).

governments to such flagrant unilateral action as in the instant case. *See generally* Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation*, 14 Va. J. Intl. Law 747, 770-74 (1974) (suggesting increased use of treaties and other international agreements concerning document production). Review of the Court of Appeals' ruling at the highest possible level is accordingly necessary.

These concerns are aptly illustrated in this case. The decision of the court below conflicts directly with the criminal nondisclosure provisions of banking regulation legislation enacted by the Parliament of the Commonwealth of the Bahamas.[3] This legislation is based upon the recognized Anglo-American legal principle that "[i]nviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers." *Peterson v. Idaho First National Bank*, 83 Idaho 578, 581, 367 P.2d 284, 290 (1961). *See* 5A Michie, *Banks and Banking* § 1 at 18 (1973 ed.).

Enacted in 1965 and strengthened in 1980, the Commonwealth's law strictly limits access to information concerning a particular depositor's account in any bank. Indeed, even the Inspector of Banks of the Bahamas cannot obtain such records unless he procures an order from the Supreme Court of the Commonwealth ruling that such access is necessary and that there are "no other means of obtaining the information required." Banks and Trust Companies Regulation Act of 1965, 1965 Bah. Act. No.

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[3] *See* Section 10 of the Banks and Trust Companies Regulation Act of 1965, 1965 Bah. Acts No. 64, as Amended by the Banks and Trust Companies Regulation (Amendment) Act, 1980, 1980 Bahamian Act No. 3; Section 19 of the Banks Act, III Bahamian Rev. Laws, c. 96 (1965), as amended by the Banks Amendment Act of 1980. The texts of § 10 and § 19 are identical. Both were initially enacted in 1965 while the Bahamas were still under British rule, and were subsequently reenacted by the Bahamian Parliament after independence.

64, § 8-(3). As discussed further in Section II below, such an order would similarly have been available to the United States in the instant case, but the government and both courts below chose to ignore this established procedure under Bahamian law.

The United States Congress has recognized and protected privacy interests similar to those protected under Bahamian law in legislation such as the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.*, and the Privacy Act, 5 U.S.C. § 552a *et seq.*, which similarly mandate that specific procedural requirements be met before disclosure may be ordered. *E.g.*, 5 U.S.C. § 552a(b); 12 U.S.C. § 3407. Even if the Commonwealth's laws were based on a different "economic and legal philosophy" than that of this country, of course, American courts would nonetheless have a clear "obligation to respect the laws of other sovereign states." *Chase Manhattan Bank, supra*, 297 F.2d at 613. The court in this case, however, failed to meet this fundamental obligation.

The affront to the Commonwealth represented by the decision below can best be appreciated by considering the reaction of the United States if the situation were reversed. Suppose that a Bahamian investigator compelled a visiting United States official to surrender documents classified by Executive Order or protected under the Privacy Act. Or suppose that a Bahamian court required the Chase Manhattan Bank or the City National Bank to produce to Bahamian investigators legally privileged documents located in New York, simply because the Bahamian authorities had served a subpoena upon the Nassau branches of the U.S. banks.[4] Suppose further that

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[4] Indeed, based upon the logic of the ruling of the court below, the Bahamian courts could require a visiting American attorney to surrender documents or give testimony in direct violation of the attorney-client privilege, the importance of which has recently been reaffirmed by this Court. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

the Bahamian investigators had not even made a determination that the confidential information at issue was relevant or necessary to their functions, and had made no effort to seek such materials through the United States courts. The United States would be justifiably outraged by such a blatant abuse of Bahamian authority. The Commonwealth of the Bahamas understandably has the same reaction to the decision of the court below, and respectfully requests that this Court review that ruling.

II. The Court Below Failed to Fulfill Its Obligation to Seek to Avoid Conflict with the Law of a Foreign Sovereign.

Precisely because of the international implications which may result from decisions concerning foreign affairs, for which this Court has recognized that the judiciary has "neither the aptitude, facilities nor responsibility," *Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948), the federal courts have long adhered to the rule that they must make every effort to "minimize the possible conflict between [their] orders and the law of a foreign state affected by [their] decisions." *United States v. First National Bank*, 396 F.2d 897, 902 (2d Cir. 1968). Indeed, even when conduct committed or ordered by another country directly violates American substantive law—unlike the situation in this case—this Court has ruled that the judiciary should avoid "passing on the validity of foreign acts of state." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). *Accord, e.g., Timberlane Co. v. Bank of America*, 549 F.2d 597, 605, 606 (9th Cir. 1976).

In this case, however, the court below barely acknowledged its duty to consider the international implications of its ruling, and did not hesitate to render a decision which the court itself recognized as an "affront to the Bahamas." 691 F.2d at 1390. In particular, the Court of Appeals completely ignored several standards and proce-

dures recognized by the courts in this country, including this Court, which could have avoided conflict with the laws of the Commonwealth.

First, courts confronted with situations such as the instant case have initially sought to determine whether the documents at issue were relevant and necessary before considering whether attempts should be made to produce them in violation of foreign law. *Compare, e.g., Trade Development Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972), *with United States v. Vetco, Inc.*, 644 F.2d 1324, 1332 (9th Cir. 1981). This principle stems from the decision of this Court in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). *See In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1146, 1154 (N.D. Ill. 1979) (holding that *Societe* requires that the documents at issue be "crucial to the determination of a key issue in the litigation").

In this case, however, the court below pointedly refused even to consider the question of the relevance of the documents at issue, despite its recognition that other courts routinely require a showing of relevance even where no specific confidentiality interests are at stake. *See In re Grand Jury Proceedings*, 486 F.2d 85 (3d Cir. 1973) (cited at 691 F.2d at 1387). The court below similarly mentioned, but then proceeded to ignore, the rule established in another Circuit that an "important need" must be shown for documents requested by a grand jury where another confidentiality rule, the attorney-client privilege, is at stake. *See In re Special Grand Jury No. 81-1*, 676 F.2d 1005, 1010-11 (4th Cir. 1981) (cited at 691 F.2d 1387 n.5).[5] In light of the comparable importance of the confidentiality provisions of the Commonwealth's bank-

[5] Indeed, the court below did not even acknowledge the specific holding of the Fourth Circuit, but characterized the decision as simply "reserving [the] question of whether [a] preliminary showing must be made in every case" to justify a grand jury subpoena. 691 F.2d at 1387 n.5.

ing laws, there can be no justification for this failure by the court below.

Second, the Court of Appeals also failed to follow the holding of this Court in *Societe Internationale*, *supra*. That decision explained that while American courts may seek to require parties to comply with discovery orders "to the maximum of their ability," sanctions cannot be imposed where a party had sought to comply in good faith but could not do so because of foreign confidentiality laws. *Id.* at 205. Following *Societe*, the appellate courts have consistently ruled that before considering the imposition of sanctions or other steps to force violation of a foreign privacy law, the lower courts should direct parties before them to make all good faith efforts to comply with production requests, such as applying for a waiver of the nondisclosure law or cooperating with American governmental efforts to obtain such a waiver. *E.g.*, *CAB v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 953 (D.C. Cir. 1979); *SEC v. Minas de Artemisa*, 150 F.2d 215, 218 (9th Cir. 1945).

In this case, the court below asserted that the bank had failed to make such good faith efforts. 691 F.2d at 1389. *But see* Petition for a Writ of Certiorari at 3. The lower courts ignored, however, the evidence that the Bank may not have had standing to seek an order of judicial assistance in a situation such as this. *Id.* at 3h (Aff. of P. Graham). If the Court of Appeals had any doubt about this, or if it felt that other options were open to the Bank, it should have remanded with directions that an order be entered requiring the Bank to make all available good faith efforts, as in *First National Bank*, *supra*, 699 F.2d at 346. Instead, the court chose to require violation of the Commonwealth's confidentiality statute, contrary to its obligation to avoid such a conflict.

In provoking such a confrontation with the laws of another sovereign state, the court below also chose to ignore a third alternative employed by the courts in such

situations: directing that the investigative authorities utilize available procedures abroad for obtaining an exemption from confidentiality statutes. *See, e.g., Ings, supra*, 282 F.2d at 152-53. Under Bahamian law, a party who requires documents protected by the banking confidentiality provisions may seek such an order from the Bahamian courts. Banks and Trust Companies Regulation (Amendment) Act of 1980, 1980 Bah. Act No. 3, § 10(1)(iii).[6] The court below was apparently confused concerning the availability of such an order to obtain the documents at issue, recognizing on the one hand that a court in the Commonwealth "would be able to order production," but nevertheless expressing uncertainty as to whether disclosure would be ordered in this case because American tax laws were involved. 691 F.2d at 1391.

Even assuming that the lower court was correct that a Bahamian court might be reluctant to order production where an investigation is for tax purposes only, however, the record below demonstrates that since the investiga-

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[6] A recent U.S. Congressional study confirms that Bahamian authorities have been cooperative regarding requests for information protected by bank secrecy laws:

> Bahamian law does provide for the lifting of bank secrecy when an attorney petitions the Supreme Court for a court order releasing requested documents. . . .
>
> U.S. Embassy officials in Nassau confirm that requests made to them are few—only three in one recent 12-month period. Further, interviews demonstrate that U.S. agencies are woefully ignorant of proper procedures. Requests are made improperly, for example, directly to the Attorney General. Yet even though procedurally such requests should be denied, in each case of a U.S. criminal matter information was supposedly forthcoming within a few weeks. Thus the administrative perogative [sic] was exercised in favor of the U.S. even when the U.S. agency failed to conform to Bahamian law with respect to request channels.

Staff Study, *Crime and Secrecy: The Use of Offshore Banks and Companies*, S. Prt. 98-21, Perm. Subcomm. on Investig., Sen. Comm. on Govt. Affairs, 98th Cong., 1st Sess. 58 (1983).

tion at issue also concerned violations of American criminal laws, an order for production would be available. *See* Affidavit of P. Graham ¶ 8, App. H to Petition for a Writ of Certiorari at 3h.

The court below appeared to imply, however, that it would not require the pursuit of such alternative means because such a course could somehow be considered a "greater interference with foreign relations than the procedures employed here," and because of "the cost in time and money." 691 F.2d at 1388, 1390. Such attempted rationales cannot justify the blatant disrespect for Bahamian procedures displayed by the Court of Appeals. There is simply no basis for the suggestion that requiring investigators to pursue the normal, accepted judicial procedures in the Bahamas to seek confidential records located there would somehow constitute a "greater interference with foreign relations" than unilaterally defying a foreign country's criminal law. Indeed, this notion reflects the very lack of appreciation for the international implications of its decision which should have impelled greater caution by the court below in the first place.

Nor can considerations of time and expense excuse the court's conduct. Even apart from the great expenditure of time and money which has already occurred in this case, this Court has recognized that where American confidentiality concerns are at stake, such "considerations of convenience do not overcome the policies served." *Upjohn*, *supra*, 449 U.S. at 396 (attorney-client privilege). Surely the democratically-enacted statutes of another sovereign state deserve equal respect. The lower court's failure to seek to employ available alternative means to avoid conflict with the Commonwealth's statutes warrants review by this Court.

CONCLUSION

The position of the Commonwealth of the Bahamas in this case was aptly summarized by the Prime Minister of the Province of Ontario in a similar situation 35 years ago:

> I recognize that in population Ontario is a very small jurisdiction compared with that of the United States. Nevertheless, I trust that no citizen of the United States will forget that Canadians are just as proud of their own nationality and just as jealous of their own sovereignty as any citizen of their own country. I hope that the government of the United States will see fit to withdraw these proceedings and follow the course which is in keeping with that close international friendship which has been an example to the whole world. [Tokyo Conference, *supra*, at 568.]

In that instance, the potential international conflict was resolved without violating Canadian law or sovereignty. *Id.* at 568-69. The Commonwealth of the Bahamas hopes that the same result will obtain here.

To that end, and in light of the conflict between the decision below and fundamental legal principles recognized by the courts both in this country and abroad, the Commonwealth urges that this Court grant a writ of *certiorari* and reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served by mailing three copies of the foregoing Brief of the Commonwealth of the Bahamas as Amicus Curiae in Support of Petition for a Writ of Certiorari by first class mail, postage prepaid, this 14th day of April, 1983, to each of the following:

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